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5 **UNITED STATES DISTRICT COURT**
6 **DISTRICT OF NEVADA**
7 **RENO, NEVADA**

8 LABORERS' INTERNATIONAL UNION) 3:05-CV-0446-ECR-RAM
9 OF NORTH AMERICA, LOCAL UNION)
10 No. 169,)
11) Plaintiff,) **ORDER**
12) vs.)
13) FREHNER CONSTRUCTION)
14) COMPANY, INC., a Nevada)
15) corporation,)
16) Defendant.)
17) _____)

18 **I. Procedural Background**

19 Plaintiff Laborers' International Union of North America,
20 Local Union No. 169 ("Plaintiff" or "Local 169") filed a Petition
21 for Declaratory Order (#2) against Frehner Construction Company
22 ("Defendant" or "Frehner") on August 8, 2005, requesting this Court
23 to declare that Frehner was bound to the Laborers' Master Agreement
24 dated July 30, 2004. On August 30, 2005, Defendant filed a Motion
25 to Dismiss (#4) pursuant to F.R.C.P. 12(b)(6) claiming that the
26 statute of limitations barred the action.¹ On September 9, 2005,

27 ¹Defendant also made the motion under F.R.C.P. 12(b)(1).
28 However, Defendant's basis for dismissal is based on the statute of
 limitations which is not relevant to a 12(b)(1) motion.

1 Plaintiff opposed (#5) Defendant's motion and on September 19,
2 2005, Defendant filed a reply in support of its Motion to Dismiss
3 (#6).

4 The motion (#4) is now ripe and we will now rule on it.

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6 **II. Factual Background**

7 We consider the facts recited in the Complaint in a light most
8 favorable to the Plaintiff which opposes the motion to dismiss.

9 Plaintiff Local 169 and Defendant Frehner have had a
10 collective bargaining agreement ("Laborers' Master Agreement") for
11 over fifteen years. These collective bargaining agreements have
12 governed the employment conditions of the employees of Frehner
13 including the wages, hours, and other conditions of employment.

14 Prior to July 2004, Frehner had assigned its proxy to
15 negotiate and enter into such labor agreements in its behalf to the
16 Nevada Chapter of Associated General Contractors of America
17 ("AGC"). On July 16, 2000, AGC and Local 169 entered into a
18 collective bargaining agreement with an effective date of July 16,
19 2000 continuing till July 15, 2005. Frehner adopted the agreement
20 and complied with the terms of the agreement thereafter. On June
21 1, 2004, Local 169 and AGC made an agreement to discuss extending
22 the collective bargaining agreement by negotiating for extension of
23 the agreement. On June 14, 2004, Local 169 sent a notice to
24 Frehner concerning scheduled meeting dates for the extension of the
25 collective bargaining agreements between them.

26 Meetings, discussing the extension of the collective
27 bargaining agreement, occurred on June 22, 2004, July 8, 2004, July

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1 15, 2004 and July 21, 2004. On July 21, 2004, an agreement was
2 reached between the representatives of Local 169 and AGC. The new
3 agreement was to extend until July 15, 2010.

4 On July 27, 2004, Frehner withdrew its proxy for negotiations
5 from the AGC. On July 27, 2004, Local 169 was informed that
6 Frehner was "going to" withdraw its proxy from AGC. Local 169
7 responded on July 29, 2004 that the union would object to such a
8 withdrawal and that Frehner was bound to the terms of the agreement
9 reached by Local 169 and AGC on July 21, 2004.

10 Local 169 and AGC executed a Memorandum of Understanding on
11 July 30, 2004, which embodied the agreements reached by the parties
12 at the July 21, 2004 meeting. The Memorandum of Understanding
13 stated, among other things, that the collective bargaining
14 agreement would remain effective until July 15, 2010.

15 In a fax dated August 13, 2004, John Madole, Jr., on behalf of
16 AGC, provided Richard Daly, Business Manager of Local 169, a copy
17 of a letter which Frehner had sent AGC revoking its proxy with
18 respect to negotiations. The Complaint does not state the date of
19 the letter or the date AGC received the letter from Frehner.

20 Nearly a year later, on May 11, 2005, Local 169 received a
21 letter from Frehner dated May 9, 2005, which stated that Frehner
22 had the right to terminate the collective bargaining agreement
23 after its termination date on July 15, 2005. Local 169 objected
24 stating that Frehner had no right to withdraw as it had only done
25 so after negotiations had commenced with AGC.

26 Frehner wrote back stating the collective bargaining agreement
27 was set to expire on July 15, 2005, and that they were willing to

1 enter into a New Agreement through negotiations with Local 169.
2 Local 169 insisted again in a letter to Frehner that they were
3 bound by the agreement signed June 30, 2004 between AGC and Local
4 169.

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6 **III. Standard of Review**

7 A motion to dismiss under Fed. R. Civ. P. 12(b) (6) will only
8 be granted if "it appears beyond doubt that plaintiff can prove no
9 set of facts in support of his claim which would entitle him to
10 relief." Lewis v. Tel. Employees Credit Union, 87 F.3d 1537, 1545
11 (9th Cir. 1996). On a motion to dismiss, "we presum[e] that
12 general allegations embrace those specific facts that are necessary
13 to support the claim." Lujan v. Defenders of Wildlife, 504 U.S.
14 555, 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S.
15 871, 889 (1990)) (alteration in original). Moreover, "[a]ll
16 allegations of material fact in the complaint are taken as true and
17 construed in the light most favorable to the non-moving party." In
18 re Stac Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996)
19 (citation omitted).

20 Although courts generally assume the facts alleged are true,
21 courts do not "assume the truth of legal conclusions merely because
22 they are cast in the form of factual allegations." W. Mining
23 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,
24 "[c]onclusory allegations and unwarranted inferences are
25 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89
26 F.3d at 1403 (citation omitted).

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1 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is
2 normally limited to the complaint itself. See Lee v. City of Los
3 Angeles, 250 F.3d 668, 688 (9th Cir. 2001). If the district court
4 relies on materials outside the pleadings in making its ruling, it
5 must treat the motion to dismiss as one for summary judgment and
6 give the non-moving party an opportunity to respond. Fed. R. Civ.
7 P. 12(b); see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir.
8 2003). "A court may, however, consider certain materials --
9 documents attached to the complaint, documents incorporated by
10 reference in the complaint, or matters of judicial notice --
11 without converting the motion to dismiss into a motion for summary
12 judgment." Ritchie, 342 F.3d at 908.

13 If documents are physically attached to the complaint, then a
14 court may consider them if their "authenticity is not contested"
15 and "the plaintiff's complaint necessarily relies on them." Lee,
16 250 F.3d at 688 (citation, internal quotations and ellipsis
17 omitted). A court may also treat certain documents as incorporated
18 by reference into the plaintiff's complaint if the complaint
19 "refers extensively to the document or the document forms the basis
20 of the plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if
21 adjudicative facts or matters of public record meet the
22 requirements of Fed. R. Evid. 201, a court may judicially notice
23 them in deciding a motion to dismiss. Id. at 909; see Fed. R.
24 Evid. 201(b) ("A judicially noticed fact must be one not subject to
25 reasonable dispute in that it is either (1) generally known within
26 the territorial jurisdiction of the trial court or (2) capable of

1 accurate and ready determination by resort to sources whose
2 accuracy cannot reasonably be questioned.").

3 "Dismissal on statute of limitations grounds can be granted
4 pursuant to Fed. R. Civ. P. 12(b)(6) 'only if the assertions of the
5 complaint, read with the required liberality, would not permit the
6 plaintiff to prove that the statute was tolled.'" Two Rivers v.
7 Lewis, 174 F.3d 987, 991 (9th Cir. 1999) (quoting Vaughan v.
8 Grijalva, 927 F.2d 476, 478 (9th Cir. 1991) (internal citations
9 omitted)).²

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11 **IV. Statute of Limitations**

12 Defendant argues that since Plaintiff was notified of
13 Frehner's withdrawal of its proxy at the latest on August 13, 2004,
14 that the statute of limitations began to run and ended on January
15 13, 2005, thus barring this action. Plaintiff argues that it only
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18 ²We note here that in its Opposition to Defendant's Motion to
19 Dismiss, Plaintiff has referred to evidence that it was not notified
20 of Frehner's withdrawal of the proxy for AGC until May 11, 2005, as
21 the fax sent from AGC to Local 169, which included the letter from
22 Frehner to AGC, only said that the proxy was withdrawn for "future
23 agreements only" and did not, therefore, include already completed
24 negotiations. However, this evidence cannot be considered in a Motion
25 to Dismiss based on F.R.C.P. 12(b)(6) which must consider the
26 Complaint and not additional material supporting the Complaint which
27 has not been properly attached to the Complaint.

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1 had notice of the withdrawal of the proxy on May 11, 2005, and,
2 therefore, its action was timely brought.

3 Plaintiff has brought its claim pursuant to Section 301 of the
4 Labor Management Relations Act, 29 U.S.C. § 185. The Supreme Court
5 has held that although Section 301 does not have an applicable
6 statute of limitations, the six-month statute of limitations from
7 the National Labor Relations Act set forth in Section 10(b) of the
8 NLRB Act, 29 U.S.C. Section 106(b), is applicable to Section 301
9 claims. DelCostello v. International Brotherhood of Teamsters, 462
10 U.S. 151, 168 (1983). The Ninth Circuit has also adopted this
11 reasoning holding, in Audette v. International Longshoremen's and
12 Warehousemen's Union, that the six-month statute of limitations
13 applied to Section 301 cases. 195 F.3d 1107, 1110 (9th Cir. 1999);
14 see also Grant v. McDonnell Douglas Corporation, 163 F.3d 1136,
15 1138 (9th Cir. 1998) ("A Section 301 claim is governed by a six-
16 month statute of limitations").

17 The six-month statute of limitations on a claim relating to a
18 contested effectiveness of the withdrawal of a proxy begins to run
19 when Plaintiff had notice that Defendant Frehner withdrew its proxy
20 for negotiations from AGC.

21 Plaintiff has argued that Hawaii Carpenters Trust Funds v.
22 Waiola Carpenter Shop, Inc. governs whether the statute of
23 limitations has tolled in this case. 823 F.2d 289, 296 (9th Cir.
24 1987). In that case, the Ninth Circuit addressed whether an
25 employer could withdraw from an association that represented its
26 interests for the purpose of collective bargaining. The Ninth
27 Circuit held that "it is well settled now that an attempted

1 withdrawal...during negotiations is neither timely nor effective."

2 Id. (internal citations omitted). Whether or not attempted
3 withdrawal during negotiations did happen in this case and was
4 prohibited by law is the subject of the controversy between Local
5 169 and Frehner and does not go to whether the six-month statute of
6 limitations would bar the action in this case.

7 As plead in the Complaint, Plaintiff had notice of Frehner's
8 withdrawal from the fax communicated on August 13, 2004, by AGC to
9 Local 169 which included the notice of withdrawal executed by
10 Frehner. As stated in the Complaint, "[b]y letter dated August 13,
11 2004, said letter being faxed to Local 169, John Madole, Jr., on
12 behalf of AGC, provided Richard Daly, Business Manager Local 169, a
13 copy of the letter sent by Frehner to AGC revoking its proxy with
14 respect to negotiations." (emphasis added). Although Plaintiff
15 claims now that such a notice pertained to "future" negotiations,
16 that the withdrawal only pertained to future negotiations is not
17 apparent within the Complaint. While it is true that Frehner's
18 statement to Local 169 on July 27, 2004, that Frehner was "going
19 to" withdraw their proxy from AGC does not demonstrate that Frehner
20 had actually withdrawn their proxy, Local 169 was further informed
21 about the actual withdrawal of the proxy from AGC in the fax
22 received by Local 169 from AGC. Since the fax was received by
23 Local 169 on August 13, 2004, the six-month statute of limitations
24 began to run after that date ending on January 13, 2005, well
25 before the initial Complaint in this action was filed.

26 We find that in light of the fact that Plaintiff has said that
27 it could produce a letter that demonstrates that Plaintiff was only

1 aware of Frehner's withdrawal of the proxy for future negotiations,
2 that Plaintiff should be allowed to amend its Complaint.

3 **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss (#4) is
4 **GRANTED**. On the face of the Complaint, the statute of limitations
5 bars this action.

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7 **IT IS HEREBY FURTHER ORDERED** Plaintiff shall have fifteen (15) days
8 within which to file an amended complaint.

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10 This 11th day of January, 2006.

11 
12 Edward C. Reed
13 UNITED STATES DISTRICT JUDGE

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